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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company

No. 899

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMISSIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 29–34) is reported in 27 B.T.A. 1127. The major-

ity and dissenting opinions of the Circuit Court of Appeals (R. 39–42) are reported in 68 F. (2d) 19.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1933 (R. 43). A petition for a writ of certiorari was filed by the Commissioner on March 17, 1934, and by the New York Trust Company on March 24, 1934. Certiorari was granted April 9, 1934 (R. 45). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

In 1906, one Matthiessen acquired certain shares for $141,375. Their cost was greater than their fair market value on March 1, 1913. On December 24, 1921, when the shares had a market value of $577,500, he transferred them to the New York Trust Company in trust for the benefit of his son. In 1922 the trustee sold the shares for $603,385. The questions raised by the two petitions are as follows:

No. 899

Whether the stock was acquired by gift within the meaning of Section 202 (a) (2) of the Revenue

[1] The Board of Tax Appeals originally dismissed this proceeding for lack of jurisdiction (20 B.T.A. 162), but on the Government's appeal this order was reversed and the case was remanded for hearing on the merits. *Commissioner* v. *New York Trust Co.*, 54 F.(2d) 463 (C.C.A. 2d), certiorari denied, 285 U.S. 556.

Act of 1921, so that the basis is the cost to the grantor, or whether the basis is the fair market value on December 24, 1921.

No. 873

If the cost to the grantor is the basis, whether the period that the stock was held by the grantor may be considered in determining whether the gain on the sale by the trustee was taxable as capital gain within the meaning of Section 206 of the Revenue Act of 1921, which defines capital assets as property "held by the taxpayer * * * for more than two years."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 29–36.

STATEMENT

The facts found by the Board of Tax Appeals (R. 30–31) may be summarized as follows:

On April 27, 1906, Conrad Henry Matthiessen, a resident of New York (R. 6), acquired 6,000 shares of the common stock of the Corn Products Refining Company at a cost of $141,375. This cost exceeded the fair market value of the stock on March 1, 1913. (R. 30.)

In order to make a settlement for his son, Matthiessen transferred the stock to the New York Trust Company in trust to accumulate the income and pay the accumulations to the son when he became twenty-one, thereafter to pay him the income yearly until he became twenty-five and at that time

to transfer the shares to him, with remainders over in the event of his death. The transfer was made by an irrevocable deed of trust dated December 24, 1921. On that date the shares had a fair market value of $577,500. (R. 31.)

During the year 1922 the New York Trust Company sold the 6,000 shares which it held as trustee for $603,385 (R. 31).[2]

In the audit of the trustee's return for 1922 the Commissioner determined that the cost of the stock to the grantor and not the fair market value of the stock as of December 24, 1921, should be used as a basis, and held that the gain was not taxable as a capital gain under Section 206 of the Revenue Act of 1921 (*infra*, pp. 30–31) (R. 5–6, 31).

The trustee appealed to the Board, claiming that the proper basis was the fair market value of the shares as of the date when they were acquired by the trustee, and that Section 202 (a) (2) of the Revenue Act of 1921 was unconstitutional, and in the alternative, that if that provision applied, the tax should be computed under the capital gain provision (R. 3). The Board sustained the Commissioner's determination (R. 34). On appeal to the Circuit Court of Appeals, that court, with one judge dissenting, sustained the Commissioner's determination as to the proper basis for computing the amount of the gain, but concluded that the gain was taxable as a capital net gain and not as ordinary income.

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[2] The grantor's son Erard Matthiessen had not reached the age of twenty-one during 1922 (R. 31).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 873

The Circuit Court of Appeals erred:

1. In holding that the gain from the sale of the stock by the respondent in 1922 was taxable as capital gain within the meaning of Section 206 of the Revenue Act of 1921.

2. In holding that the gain from the sale of the stock by the respondent in 1922 was not taxable as ordinary income.

3. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

Under Section 202 (a) (2) of the Revenue Act of 1921 (*infra*, p. 29), which is applicable to "property, acquired by gift", the basis for determining the gain from the sale of the stock by the trustee was its cost to the grantor. In the present case the trustee who sold the stock received it by an irrevocable transfer in trust, which completely divested the grantor of all ownership of or interest in the property. The transfer of title from the donor to the trustee was made by delivery of the securities and was without consideration. This was a gift in trust, as distinguished from a gift direct, but it was none the less a gift. If there could have been any doubt on this question, it is removed, we submit, by this Court's decision in *Burnet* v. *Guggenheim*, 288 U.S. 280. Since, as it

was there held, the relinquishment of a power to revoke a trust constitutes a gift, it would seem to follow *a fortiori* that the creation of an irrevocable trust is likewise a gift.

A gift is a transaction affecting the legal title to property. The essential requirements of a gift have been developed at law as distinguished from in equity. Gifts may be beneficial or otherwise; but if a gratuitous transfer does not result to the benefit of the transferee, the reasons lie in equity—the transaction is none the less a gift at law.

The Bureau of Internal Revenue has consistently construed the phrase "acquired by gift" to include irrevocable transfers in trust. These rulings have not been revoked and are still in effect. This long continued administrative interpretation of the statute is entitled to great weight.

In the Revenue Act of 1924, Congress included a specific provision relating to transfers in trust. We submit that in so doing Congress was enacting into law the accepted administrative interpretation in order to remove any possible doubt as to the correctness of that interpretation.

II

The gain from the sale by the trustee is not taxable as a capital gain under Section 206 of the Revenue Act of 1921 (*infra,* pp. 30–31). In that section the term "capital assets" is defined as property "held by the taxpayer" for more than two years. In this case, the trust is the taxpayer, and it is un-

disputed that the trust had not held the property for two years. There is no ambiguity in the statute. It allows no room for construction.

The conclusion that the property sold by the trustee did not constitute "capital assets" is not only required by the plain text of the statute itself, but this was the contemporaneous construction of the Treasury Department which has been uniformly followed by the Board of Tax Appeals and by the courts, until the decision of the court below in the present case. The question was passed on in three rulings of the Treasury Department, beginning in 1921. Thereafter the issue was raised before the Board of Tax Appeals, and the Board in at least six cases reached the same conclusion. The same result was reached in two appellate courts. The decision of the court below, more than twelve years after the enactment of the statute, was the first decision of any court or tribunal to the contrary. In so doing, we submit that the court below ignored the rule that the plain meaning of a statute may not be circumvented by "construction."

The rule for which the taxpayer contends was expressly adopted in Section 208 of the Revenue Act of 1926 (*infra*, pp. 33–34). But such a change in the law cannot authorize construction of an earlier Act not consonant with the language there employed. Here the change in the statute is contrary to the plain language of the earlier law and also to the

uniform administrative construction of that law. The change shows a recognition of the administrative construction and a desire on the part of Congress to establish a different rule for the future. Congress could have made the change retroactive if it had desired; but it did not do so.

ARGUMENT

I

UNDER SECTION 202 (a) (2) OF THE REVENUE ACT OF 1921, THE BASIS FOR DETERMINING THE GAIN FROM THE SALE OF THE STOCK BY THE TRUSTEE WAS ITS COST TO THE GRANTOR

Section 202 (a) (2) of the Revenue Act of 1921 (*infra*, p. 29) provides that the basis for ascertaining the gain or loss sustained from a sale of property shall be the cost of the property, except that—

> In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

In the present case, the trustee who sold the stock received it by an irrevocable transfer in trust, which completely divested the grantor of all ownership of or interest in the property. The transfer of title from the donor to the trustee was made by delivery of the securities, and was without consideration. Clearly, the donor made a gift to someone. The trustee received the title, not for its own benefit, but upon a trust for others. In other words, the

gift was not direct to the intended beneficiaries, but to a trustee for them. It was a gift in trust, as distinguished from a gift direct, but it was none the less a gift, because it was a transfer of the property by delivery, *inter vivos,* and without consideration. If title passed to the trustee at all (and everyone agrees it did) it must have passed by gift. No other known legal machinery for passing title is applicable to the actual transaction. Since the title passed by gift, and passed to the trustee, it must follow that the trustee acquired the property by gift. The transaction was, therefore, covered by Section 202 (a) (2), *supra,* since that provision is in terms applicable to property "acquired by gift."

The basis for determining gain or loss in the case of purchases of property is prescribed in other subdivisions of Section 202, and these subdivisions show by contrast that the provision involved in this case was intended to cover all acquisitions of property without cost. In *Taft* v. *Bowers,* 278 U.S. 470, this Court recognized that the purpose of Congress in enacting Section 202 (a) (2) was to prevent the escape from taxation of the increase in value of property which was possible under earlier statutes under which an owner of property could transfer it to his wife or children, and thus establish a new and increased basis for measuring the gain upon its sale. See also *Cooper* v. *United States,* 280 U.S.

409. And as this Court said in *District of Columbia* v. *Brooke*, 214 U.S. 138, 150, " not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated." It is obvious that evasion could be accomplished as readily and as satisfactorily by the donor if he transferred his property in trust for his wife or children as if he made an outright gift to them. It would therefore seem to follow that Congress intended the word "gift" in Section 202 (a) (2) to include gifts in trust as well as direct gifts. The mischief is the same in either case, and the language used was apt to cover both, for the phrase "property, acquired by gift" is plainly broad enough to include gifts in trust as well as gifts direct.

If there could have been any doubt on this question, it is removed, we submit, by this Court's decision in *Burnet* v. *Guggenheim*, 288 U.S. 280. That case involved Section 319 of the Revenue Act of 1924 (U.S.C., Title 26, Sec. 1131), imposing a tax upon "the transfer by a resident by gift * * * of any property wherever situated, whether made directly or indirectly, * * *." This Court held that the surrender of the power to revoke a revocable deed of trust constituted a transfer of the property by gift and was thus subject to the tax. Since the relinquishment of a power to revoke a trust constitutes a gift, it would seem to follow *a*

fortiori that the creation of an irrevocable trust is likewise a gift.[3]

This conclusion is supported by many other cases in which gratuitous transfers of property in trust have been held to be gifts. Thus, in *Moore* v. *Tiller*, 61 F. (2d) 478 (C.C.A. 5th), the court said (p. 479):

> The manifestation of an intention to make a present gift to another, and, in consummation of this intention, delivery of the property to *or for the use of the intended donee*, or some act indicating a renunciation of dominion in favor of the intended donee, are essentials of a gift, whether *inter vivos* or *causa mortis*. * * * (Italics ours.)

Similar language is found in *Bok* v. *McCaughn*, 42 F. (2d) 616, 618 (C.C.A. 3d). See also *Ithaca Trust Co.* v. *United States*, 279 U.S. 151.

We submit that there is no merit in the argument of the trustee that it did not acquire the property by gift within the meaning of the statute because it did not receive the ultimate beneficial interest in the property.[4] Apart from the considerations

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[3] In *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 346, 347, 348, this Court repeatedly referred to transfers in trust as gifts. And in *Heiner* v. *Donnan*, 285 U.S. 312, 320, this Court said, in stating the facts, that "Donnan, by complete and irrevocable gift *inter vivos*, transferred without consideration certain securities to trustees for his four children."

[4] The ultimate beneficial interest in the property of a corporation is in its stockholders and not in the corporation itself. Nevertheless property transferred to the corporation without consideration is acquired by the corporation by gift for tax purposes. *Commissioner* v. *Rosenbloom Finance Corp.*, 66 F. (2d) 556 (C.C.A. 3d), certiorari denied, 290 U.S. 692.

already advanced, this argument ignores the fact that under both Section 2 (9) and Section 219 of the Act (*infra*, pp. 29, 31–32), the trust is the taxpayer, and the trustee is simply charged with the duty of making the return. In a trust such as this, where the income is to be accumulated and the trust alone is taxed on the income during the period of accumulation, the trust (through the agency of the trustee) represents all the interests in the property. Admittedly the trust is regarded as a unit for the purpose of taxing the gain from the sale of the property. Just as the sale by the trustee is a sale of the property itself and not of separate interests in it, so the acquisition by the trustee is an acquisition of the property. Though the trustee did not receive the beneficial interest, it did acquire the legal title, and it acquired that title by gift. The taxpayer's argument makes the statute applicable only to the sale of the beneficial interest; but the statute itself makes no such limitation. The taxpayer's argument on this point, it would seem fair to say, falls within this Court's language in *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370, where it said:

> And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

A similar argument was advanced and rejected in *Security Trust Co.* v. *Commissioner*, 65 F. (2d)

877 (C.C.A. 6th), certiorari denied, 290 U.S. 686, where it was held that a testamentary trustee acquires the property by bequest or devise as of the date of the decedent's death, so that the basis is the fair market value at that time. Since a testamentary trustee acquires property by bequest or devise, though the bequest or devise is for the ultimate benefit of beneficiaries and not for the trustee, it would seem to follow that the trustee acquired the property in this case by gift, although the gift was not for its own benefit.

A gift is a transaction affecting the legal title to property. The essential requirements of a gift have been developed at law, as distinguished from in equity. A gift is merely a voluntary transfer of property by one to another without consideration, and effectuated through delivery either of the property or of a deed representing the property. *Commissioner* v. *Rosenbloom Finance Corp.*, 66 F. (2d) 556 (C.C.A. 3d), certiorari denied, 290 U.S. 692; *Noel* v. *Parrott*, 15 F. (2d) 669 (C.C.A. 4th), certiorari denied, 273 U.S. 754. Gifts may be beneficial or otherwise; but if a gratuitous transfer does not result to the benefit of the transferee, the reasons lie in equity—the transaction is none the less a gift at law.

The Bureau of Internal Revenue has consistently construed the phrase "acquired by gift" to include irrevocable transfers in trust. See I.T. 1379, I–2 Cumulative Bulletin (July–December 1922) 41

(transfer by will); I.T. 1636, II–1 Cumulative Bulletin (January–June 1923) 20; I.T. 1622, II–1 Cumulative Bulletin (January–June 1923) 135. These rulings have not been revoked and are still in effect. This long-continued administrative interpretation of the statute is entitled to great weight. *Brewster* v. *Gage*, 280 U.S. 327; *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488.

In the court below it was argued that since Congress in enacting the Revenue Act of 1924 included a specific provision concerning the basis to be used in measuring gain in the case of property transferred in trust (Section 204 (a) (3); *infra*, pp. 32–33), it must be assumed that the law prior to that time was different. We submit that in view of the fact that the administrative rulings under the Revenue Act of 1921 were to the same effect as the new provision, it is more reasonable to assume that Congress was enacting into law the accepted interpretation of existing law in order to remove any possible doubt as to the correctness of that interpretation. *Jordan* v. *Roche*, 228 U.S. 436, 445–446; *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837, 842 (C.C.A. 2d), certiorari denied, 282 U.S. 897; *Dickey* v. *Burnet*, 56 F. (2d) 917 (C.C.A. 8th), certiorari denied, 287 U.S. 606. See also *Burnet* v. *S. & L. Bldg. Corp.*, 288 U.S. 406.

The statement of the Ways and Means Committee of the House of Representatives in regard to the change in the law was as follows (House Rep. No. 179, 68th Congress, 1st Sess., p. 16):

Section 204:

> (1) There is no provision in the existing law which corresponds to paragraph (3). This paragraph applies the same principles to transfers to a trustee as is applied in paragraph (2) to gifts, and provides that where property was acquired after December 31, 1920, by a transfer in trust, the basis for determining the gain or loss from its sale shall be the same as it would be in the hands of the grantor.

Senate Rept. No. 398, 68th Congress, 1st Sess., p. 17, is as follows:

> There is no provision in the existing law which corresponds to paragraph (3) of subdivision (a). According to this paragraph, the basis for determining gain or loss from the sale or other disposition of property acquired after December 31, 1920, by a voluntary transfer in trust, is the same as it would be in the hands of the grantor, following the principle laid down in paragraph (2) as to gifts. If the transfer in trust resulted in the recognition of a taxable gain or a deductible loss to the grantor, then this basis will be increased or decreased accordingly.

These statements give no indication that Congress was intending to change the law as it had been interpreted by the Bureau; they are equally consistent with the view that Congress intended only to make clear in the statute what had theretofore been left to interpretation. The situation is somewhat similar to that involved in *Rice* v. *Eisner*,

16 F. (2d) 358, 360 (C.C.A. 2d), certiorari denied, 273 U.S. 764.

The trustee relies upon the decisions of the Board of Tax Appeals in *Francis* v. *Commissioner*, 15 B.T.A. 1332, and *Bankers Trust Co.* v. *Commissioner*, 24 B.T.A. 10. The Board distinguished both of these cases in its decision in the present case, and we submit, correctly. In the *Francis* case there was no gift of the property after December 31, 1920, and Section 202 (a) (2) of the Revenue Act of 1921 only applies to property acquired by gift after that date. In the *Bankers Trust* case the transfer was not absolute and irrevocable, for by its terms the grantor reserved an interest in the income and upon the happening of certain events the principal would return to his estate. Such a transaction obviously falls far short of the common law requirement for a gift.

In the present case the trust was irrevocable and the grantor reserved no interest of any kind in the income or in the principal of the trust property. The gift was as complete when the trust was created as it would ever be. The transaction constituted not a purchase but a transfer without consideration, that is, a gift; and Section 202 (a) (2) required that the increment in the value of the stock during the period that it was held by the grantor should be included in the gain from the sale.

II

THE GAIN FROM THE SALE BY THE TRUSTEE IS NOT TAXABLE AS A CAPITAL GAIN UNDER SECTION 206 OF THE REVENUE ACT OF 1921, SINCE THE PROPERTY WAS NOT HELD BY THE TAXPAYER FOR MORE THAN TWO YEARS

Section 206 of the Revenue Act of 1921 (*infra*, p. 30) provides that the net gain from the sale of capital assets may be taxed at the rate of 12½% instead of at the ordinary rates, and provides that the term "capital assets" as used in the section shall mean—

> property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), * * *.

In Section 2 (9) of the Act the term "taxpayer" is defined as including—

> any person, trust or estate subject to a tax imposed by this Act;

By Section 219 of the same Act it is provided:

> (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (3) Income held for future distribution under the terms of the will or trust; * * *
>
> * * * * *
>
> (c) In cases under paragraphs (1), (2), or (3) of subdivision (a) * * * the tax shall be imposed upon the net income of

> the estate or trust and shall be paid by the fiduciary, * * *.

When these provisions of the statute are applied to the facts of this case, we submit that there can be no possible doubt as to their meaning and application. There is no dispute as to the facts. A trust was created on December 24, 1921, with the New York Trust Co. as trustee. By the terms of the trust, the trustee was directed to collect the income and accumulate it until Erard A. Matthiessen should reach the age of 21 years. Erard Matthiessen had not reached the age of 21 during the year 1922, the tax year in question (R. 31). The trust was, therefore, one under which the income was "held for future distribution" under Section 219 (a) (3) of the statute. Under paragraphs (a) and (c) of Section 219, the income of such a trust was expressly subjected to the tax imposed by Sections 210 and 211 of the Act. Under Section 2 (9), the trust was, therefore, expressly defined as the "taxpayer." *Anderson* v. *Wilson,* 289 U.S. 20, 27. Since it is undisputed that the trustee in this case had not held the property for two years, it must follow that the taxpayer had not held the property for two years, and thus that the property in question did not constitute "capital assets" as that term is defined in Section 206 of the Revenue Act of 1921.

There is no ambiguity in the statute; its terms are clear. The statute provides no exception of any sort; it allows no room for construction. As

this Court said in *United States* v. *Hartwell*, 6 Wall. 385, 396:

> If the language be clear it is conclusive. There can be no construction where there is nothing to construe.

This Court has recently applied this rule in *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83. See also *Ruggles* v. *Illinois*, 108 U.S. 526, 534; *Lake County* v. *Rollins*, 130 U.S. 662, 670–671; *Hamilton* v. *Rathbone*, 175 U.S. 414, 419; *Caminetti* v. *United States*, 242 U.S. 470; *Thompson* v. *United States*, 246 U.S. 547, 551.[5] "Where the statute contains no exception, the courts cannot create one." *Hyde* v. *Shine*, 199 U.S. 62, 78. To do so "would be to enact a law under the pretense of construing one." *Heiner* v. *Donnan*, 285 U.S. 312, 331.

The conclusion that the property sold by the trustee in this case did not constitute "capital assets" is not only required by the plain text of the statute itself, but this was the contemporaneous construction of the Treasury Department which has been uniformly followed by the Board of Tax Appeals and by the courts, until the decision of the

[5] In *Hamilton* v. *Rathbone*, *supra*, this Court said (p. 419): "But where the Act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." And in *Thompson* v. *United States*, *supra*, this Court said (p. 551): "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

court below in the present case. The question arose in the Treasury Department very shortly after the enactment of the Revenue Act of 1921. It was first passed upon in I.T. 1379, I–2 Cumulative Bulletin (July–December 1922) 41, which was promulgated in July 1922, during the tax year in question in this case. That ruling involved stock which had been given to a trust company in trust, and the question passed on was precisely the same as that raised here. It was held that—

> Section 206 of the Revenue Act of 1921 has no application, because the securities have not been held by the trustee for a period of two years prior to the sale.

The same question was also directly involved in I.T. 1660, II–1 Cumulative Bulletin (January–June 1923) 36, which was promulgated before the trustee in this case filed its return. That ruling involved facts substantially the same as those here, so far as the present case is concerned. Its holding is in the following terms:

> Held, the date of acquisition of the stock for the purposes of Section 206 of the Act, if the stock constituted a gift inter vivos, was the date upon which the gift was made; * * *. Therefore, as the stock had not been held for more than two years prior to its sale, the taxpayer will not be permitted to treat the amount of profit derived from the sale as capital gain.

A similar ruling was made in I.T. 1889, III–1 Cumulative Bulletin (January–June 1924) 70, where

the question at issue was the date of acquisition of property acquired by will.[6]

This construction of the statute received legislative approval when Congress reenacted the definition of capital assets in the Revenue Act of 1924 without change. See Section 208 (a) (8) of the Revenue Act of 1924. The administrative construction, therefore, being contemporaneous, and having been accepted by Congress in the reenactment of the statute, should be given the force and effect of law. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488; *Brewster* v. *Gage*, 280 U.S. 327. This is especially true where the departmental practice merely carries into effect the plain and unambiguous terms of the statute itself.

Following the administrative construction of the statute in the Treasury Department, taxpayers raised the issue before the Board of Tax Appeals, and the Board in at least six cases reached the same conclusion.[7] The same result was reached in two

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[6] Article 1651 of Regulations 62 (*infra*, pp. 35–36), under the Revenue Act of 1921, and Article 1651 of Regulations 65, under the Revenue Act of 1924, define the term "capital assets", in the language of the statute, as property "held by the taxpayer" for more than two years.

[7] *McKinney* v. *Commissioner*, 16 B.T.A. 804; *Johnson* v. *Commissioner*, 17 B.T.A. 611, affirmed, 52 F. (2d) 726 (C.C.A. 3d); *Shoenberg* v. *Commissioner*, 19 B.T.A. 399, affirmed, 55 F. (2d) 543 (App.D.C.); *Steagall* v. *Commissioner*, 24 B.T.A. 1231; *McCrory* v. *Commissioner*, 25 B.T.A. 994, affirmed without consideration of this point, C.C.A. 5th, decided March 19, 1934; *New York Trust Co.* v. *Commissioner*, 27 B.T.A. 1127 (the present case).

appellate courts before whom taxpayers brought these decisions of the Board for review. *Johnson* v. *Commissioner,* 52 F. (2d) 726 (C.C.A. 3d); *Shoenberg* v. *Burnet,* 55 F. (2d) 543 (App.D.C.). These courts rejected the argument that a donee may consider the time that the donor held the property in order to bring himself within the two-year requirement of Section 206, on the ground that the donee must use the donor's basis in measuring his loss. In the *Johnson* case the court said (p. 727):

> Indeed, the words used by Congress in section 206 are so plain that there is no call for construction or conjecture.

The court also pointed out that Section 202, relating to the basis for determining gain or loss, and Section 206, defining the phrase "capital assets", have no necessary relation, and that the provisions of the one section are wholly independent of the provisions of the other.

The decision of the court below, more than twelve years after the enactment of the statute, and with one judge dissenting (R. 42), was the first decision of any court or tribunal holding that the time during which the property was held by the grantor may be added to the time during which it was held by the trustee for the purpose of measuring the two-year period provided in Section 206. In reaching this result, the majority of the court below made no mention of the contemporaneous and uniformly continued administrative construction, nor of the unbroken line of decisions of the Board of Tax Ap-

peals. It expressly recognized (R. 40) that the taxpayer "did not 'hold' the property for two years in the usual sense." It held, nevertheless, that the trustee must be "treated as though he had" held the property for two years (R. 41). This conclusion is apparently based largely on the ground that the contrary result "seems to us an extremely improbable one for Congress to have intended" (R. 40). But the court's concession that the trustee had not held the property for two years "in the usual sense" seems to be fatal to the result which it reached. This Court has repeatedly held that the words of a statute must be given their "usual, ordinary and everyday meaning." *Old Colony Railroad Co.* v. *Commissioner,* 284 U.S. 552, 561. See also *Lynch* v. *Alworth-Stephens Co.,* 267 U.S. 364, 370; *DeGanay* v. *Lederer,* 250 U.S. 376, 381; *Maillard* v. *Lawrence,* 16 How. 251, 261. And this Court has also held that the plain meaning of a statute may not be circumvented by "construction" merely because "hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation." *Crooks* v. *Harrelson,* 282 U.S. 55, 60. In the latter case this Court also said (p. 61):

> But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction.

This rule is as applicable in favor of the Government as against it, especially where as here the statutory provision in question is one of exemption as to which all doubts must be resolved against the taxpayer. *Bank of Commerce* v. *Tennessee*, 161 U.S. 134, 146; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 235.

The conclusion that the word "taxpayer" as used in Section 206 means the trustee in this case and not the trustee together with the donor (who is not subjected to any tax on the transaction) is fortified by another group of cases. In Section 204 (c) of the Revenue Act of 1924 it is provided that "in the case of mines, oil and gas wells, discovered by the taxpayer after February 28, 1913", the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter. It has been contended in several cases that this provision is applicable where the discoverer of the oil well or mine turns it over to a corporation in return for all the stock of the corporation. Where such a transfer is made, no gain or loss is recognized, and the transferee takes as its basis for determining gain or loss the basis of the transferor. Section 203 (b) (4) of the Revenue Act of 1924. The argument made is that since the transferee takes the transferor's basis, it must be regarded as standing in the shoes of the transferor, and is, therefore, entitled to a depletion allowance based on discovery. The argument is, therefore, substantially the same as that advanced in the pres-

ent case. It has, however, been uniformly rejected. *Darby-Lynde Co.* v. *Commissioner,* 51 F. (2d) 32 (C.C.A. 10th); *Rialto Mining Corp.* v. *Commissioner,* 25 B.T.A. 980; *Hoffer Oil Corp.* v. *Commissioner,* 27 B.T.A. 98. The same contention has been advanced and similarly rejected where the taxpayer in question (as the trustee here) is a donee, and therefore takes his donor's basis. *Thompson* v. *Commissioner,* 10 B.T.A. 25; *McKinney* v. *Commissioner,* 16 B.T.A. 804; *Daniel* v. *Commissioner,* 16 B.T.A. 925, affirmed on other grounds, 45 F. (2d) 58 (C.C.A. 5th); *Scarbrough* v. *Commissioner,* 18 B.T.A. 951; *McCrory* v. *Commissioner,* 25 B.T.A. 994, affirmed on other grounds, C.C.A. 5th, decided March 19, 1934.

In the court below the taxpayer relied almost solely on the fact that the rule for which it contends was expressly adopted in Section 208 of the Revenue Act of 1926 (*infra,* pp. 33–34). In that Act, the following sentence was added to the definition of the term "capital assets":

> In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

This change in the law was referred to in the opinion of the court below (R. 40). But this change "introduced into the Act of 1926 can not authorize construction of the earlier one not consonant with the language there employed." *Russell* v. *United States*, 278 U.S. 181, 188. The situation seems indistinguishable from that involved in *Spring City Foundry Co.* v. *Commissioner*, Nos. 727, 728, October Term, 1933, decided April 30, 1934, where this Court said:

> We think the fair import of this provision, as contrasted with the earlier one, is that the Congress, recognizing the significance of the existing provision and its appropriate construction by the Treasury Department, deliberately intended a change in the law.

See also *Schwab* v. *Doyle*, 258 U.S. 529, 536; *Brewster* v. *Gage*, 280 U.S. 327, 337.

We are not unmindful that we have argued in Point I above that the change in the statute there involved represented no change in the law but merely enacted into law the administrative interpretation of the earlier statute. The argument there is in no way inconsistent with our position here. There the change in the text of the statute was in precise accord with the administrative interpretation of the prior law. Here the change in the statute is contrary to the administrative construction of the prior law as well as to its plain language. It shows a recognition of the administrative construction by Congress and a desire on the

part of Congress to change the law for the future. Congress could have made the change retroactive if it had desired to do so; but it did not. Congress must, therefore, have intended a change in enacting the present provision, and this is confirmed by the committee reports. In House Report No. 1, 69th Congress, 1st Sess., the House Committee on Ways and Means said (p. 7):

> The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.

To the same effect is Senate Report No. 52, 69th Congress, 1st Sess., p. 18. These reports show that the committees of Congress referred to the provision as an "amendment." They furnish no basis for the contention that Congress desired that Section 208 (a) (8) of the Revenue Act of 1926 should be given retroactive effect. In the absence of such an intention, the new provision has no effect on cases arising under the earlier Act. *United States* v. *Magnolia Co.*, 276 U.S. 160.

There is consequently no support, either in the terms of the statute itself, in its administrative construction, or in the change introduced in the 1926 Act for the construction which the Circuit Court of Appeals has placed upon the statute. Since the

property here in question was not held by the taxpayer for more than two years, the gain from the transaction must be treated as an ordinary gain and not as a capital gain.

CONCLUSION

The decision of the Circuit Court of Appeals on the first issue should be affirmed, and its decision on the second issue should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 229, 232, 246

SEC. 2. That when used in this Act—

* * * * *

(9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property ac-

quired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

* * * * *

(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but— * * *

SEC. 206. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

* * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in

the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

(c) In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income held for future distribution under the terms of the will or trust; and

* * * * *

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. * * *

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within sub-

division (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

REVENUE ACT OF 1924, C. 234, 43 STAT. 253

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made. The provisions of this paragraph shall not apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921 or in subdivision (c), (d), or (f) of section 302 of this Act. (U.S.C., Title 26, Sec. 935.)

REVENUE ACT OF 1926, C. 27, 44 STAT. 9

SEC. 208. (a) For the purposes of this title—

* * * * *

(8) The term "capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 204 the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the

property exchanged. In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of subdivision (c) of section 203 of this Act or of the Revenue Act of 1924, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

TREASURY REGULATIONS 62, UNDER THE REVENUE ACT OF 1921

ART. 1562. *Sale of property acquired by gift after December 31, 1920.*—In computing the gain or loss from the sale or other disposition of property acquired by gift subsequent to December 31, 1920, the basis shall be the same as it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. This basis in the hands of the donor or last preceding owner by whom it was not acquired by gift shall be determined under the provisions of article 1561 and the taxable gain or deductible loss from the sale or exchange shall be computed in accordance therewith. * * *

ART. 1563. *Sale of property acquired by gift on or before December 31, 1920, or by bequest, devise,*

or inheritance.—In computing the gain or loss from the sale or other disposition of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (a) such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death, and (b) such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death. See further section 402 (c) and (e) and Regulations 63, articles 17–21, 24 and 25. In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the taxable gain or deductible loss from the sale or other disposition thereof shall be computed in accordance with article 1561. * * *

ART. 1651. *Definition and illustration of capital net gain.*—(a) Section 206 applies only to sales or exchanges of capital assets consumated after December 31, 1921. It provides that any taxpayer other than a corporation may, if he so desires, state separately in his return his net gain on sales or exchanges of capital assets and pay on such capital net gain (as defined and limited in the section) a flat tax of 12½ percent in lieu of the tax he would otherwise pay on such income under sections 210 and 211. On his net income from other sources, termed "ordinary net income" in this section, he

would be taxed under those sections. If, however, he elects thus to segregate his capital net gain, his total tax on the aggregate amount of both kinds of income must be at least 12½ percent thereof. The term "capital assets" is defined to mean property of any kind whatever acquired and held by the taxpayer for profit or investment for more than two years, whether or not connected with his trade or business, not including property (for example, a dwelling) held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind properly included in an inventory. * * *

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